STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2011
v	No. 288657 Oakland Circuit Court
ROBERT LEE CHILDRESS, JR., Defendant-Appellant.	LC No. 2008-219884-FH

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of larceny by conversion of property valued at $20,000 or more, MCL 750.362, and making a false assignment of a motor vehicle title, MCL 257.254. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 4-1/2 to 30 years for each conviction. For the reasons set forth below, we affirm.

I. FACTS

Defendant and his fiancée, Glenda Gadie, obtained financing to purchase a new Lexus vehicle and then sold it approximately a week later without disclosing the security interest in the vehicle and without repaying the purchase loan. Evidence showed that defendant and Gadie bought the 2007 Lexus from a dealership on March 31, 2007. The purchase was financed with a loan for $51,609 provided by Toyota Motor Credit ("TMC"), and the original certificate of title listed TMC as a lienholder. On April 9, 2007, an individual identifying himself as Kevin Brown, who had been authorized to act as the titleholders' agent, presented documentation falsely representing that TMC's lien had been released and obtained a corrected certificate of title that did not disclose the lien. On April 10, 2007, defendant and Gadie, using the corrected certificate of title, sold the Lexus to Motor Car Gallery for $45,000. According to Gadie, who testified at defendant's trial pursuant to a plea agreement, defendant received all of the proceeds from the sale.

II. SELF-REPRESENTATION

Defendant represented himself at trial and argues that structural error occurred because the trial court failed to secure a valid waiver of his right to counsel.

To properly preserve an issue for appeal, a defendant must timely object in the trial court, even if the right asserted is constitutional in nature. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Because defendant never raised this issue in the trial court, it is unpreserved and we review the issue for plain error affecting defendant's substantial rights. *Id.*[1]

A defendant's right to the assistance of counsel at trial is guaranteed by both the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). Any waiver of the right to counsel must be knowingly, voluntarily, and intelligently made by the defendant. *Id.* at 188. Courts make every presumption against the waiver. *Id.* A trial court's factual findings surrounding a waiver are reviewed for clear error. *Id.* at 187.

When confronted with a defendant's initial request for self-representation, a trial court must determine, under standards established in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), that

> (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*Russell*, 471 Mich at 190.]

A trial court must also satisfy the requirements of MCR 6.005(D). *Russell*, 471 Mich at 190. This court rule provides that a court may not permit the defendant's initial waiver of the right to counsel without:

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

[1] While this standard generally requires a showing that a plain error was prejudicial, if the error is structural in nature, prejudice is presumed. *Carines*, 460 Mich at 763-765. Even if these requirements are satisfied, an appellate court must exercise discretion in deciding whether to reverse. *Id*. at 763. "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); see also *Carines*, 460 Mich at 763.

But a trial court need not follow a "litany approach" to establish compliance with the requirements of *Anderson* and MCR 6.005(D). See *Russell*, 471 Mich at 191. It is sufficient that the court substantially comply with the substantive requirements. *Id.* "The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach." *People v Adkins (After Remand)*, 452 Mich 702, 727; 551 NW2d 108 (1996), overruled in part on other grounds in *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004). Once a defendant waives his right to counsel, a trial court is obligated to reaffirm the waiver at any subsequent proceedings in accordance with MCR 6.005(E), although the reaffirmance does not have constitutional implications. See *People v Lane*, 453 Mich 132, 137-138; 551 NW2d 382 (1996).

Because this case involves defendant's initial waiver of his right to counsel at trial, it is not necessary to consider MCR 6.005(E). Nonetheless, it is apparent from the record that the parties and the trial court appeared at trial with an understanding that defendant had already waived his right to counsel. At the onset of trial, defendant was asked by the trial court to place his appearance on the record. And although defense counsel also appeared at trial, he stated that his purpose was to assist defendant. But because neither party asserts that a record was made of any waiver before trial, we have reviewed the trial record to determine whether the substantive requirements of a valid waiver were met.

With regard to the first requirement established by *Anderson*, 398 Mich at 367-368, defendant's statement at trial after the jury was selected that, "I'm going to represent myself," clearly establishes that defendant made an unequivocal request for self-representation.

With respect to the second *Anderson* requirement, that the trial court determine whether "defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation," *Russell*, 471 Mich at 190, a defendant's competence is a pertinent consideration in assessing whether the defendant knows what he is doing and is making his decision "with eyes open." *Anderson*, 398 Mich at 368. Competence does not refer to legal skills because a defendant's technical legal knowledge is not relevant to determine whether he is knowingly exercising the right to self-representation. *Id.* But a court is permitted to take a realistic account of a defendant's mental capacities in deciding if he is mentally competent to conduct the defense. *Indiana v Edwards*, 554 US 164, 177-178; 128 S Ct 2379; 171 L Ed 2d 345 (2008).

Here, the trial court advised defendant of the dangers and disadvantages of self-representation during several exchanges at trial. The court explained to defendant that he had no courtroom experience and could not expect to compete with the prosecutor, that he was not equipped to argue the law, and advised him that "you're better off having an attorney represent you who knows the rules, who knows the procedure, who knows how to operate in a courtroom." Although the trial court did not make an express finding that defendant fully understood, recognized, and agreed to abide by waiver of counsel procedures, *Adkins*, 452 Mich at 726-727, "[w]here there is error but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required." *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994) (opinion of Griffin, J.); see also *Adkins*, 452 Mich at 735 (trial court's failure to note reasons for finding a proper waiver was not enough to defeat a finding of substantial

compliance with waiver procedures). Because the record here reveals that defendant knowingly and voluntarily chose to exercise his right to self-representation, the trial court's failure to make an express finding is not enough to find a lack of substantial compliance with the *Anderson* requirement that defendant knowingly and voluntarily exercise his right of self-representation.

This conclusion is supported by defendant's prior experience with the criminal justice system, as evidenced by his fourth habitual offender status. Further, defendant had an opportunity to gain insight into his ability to proceed in propria persona by filing various pro se motions before trial, though he was then represented by counsel. A defendant's history of personal involvement with the criminal justice system is an appropriate consideration to determine the existence of a knowing and intelligent waiver. *Anderson*, 398 Mich at 370-371. Further, the trial court gave a preliminary instruction to the jury, in defendant's presence, that defendant would be subject to the same rules as the prosecutor and "he has to follow the rules just like every other lawyer." After this instruction, and again after the court reiterated during defendant's cross-examination of the prosecution's first witness that defendant must follow the rules, defendant reaffirmed his desire and intent to represent himself. The trial court again revisited defendant's decision to represent himself at the close of the first day of trial. Despite the trial court's warnings that "you don't know what you're doing" and "inexperience is sinking your own ship," defendant continued to represent himself, with the assistance of standby counsel.

A defendant who represents himself at trial is allowed to control the organization and content of the defense, to make motions, argue points of law, participate in voir dire, question witnesses, and to address the court and jury at appropriate times. *People v Kevorkian*, 248 Mich App 373, 423; 639 NW2d 291 (2001). It is clear from the record that defendant wanted to control his entire case at trial, although he worked with standby counsel. Because the record clearly establishes a knowing, intelligent, and voluntary assertion of the right to self-representation, the court substantially complied with the second *Anderson* requirement.

We reach this same conclusion with respect to the third *Anderson* requirement, even though the trial court did not make an express determination that defendant would not disrupt, unduly inconvenience, or burden the court and the administration of the court's business. Although the potential for undue disruptions existed because of defendant's lack of legal training, the trial court adequately accounted for this factor by requiring defendant to comply with the same rules as the prosecutor.

Further, the trial court complied with MCR 6.005(D)(2) by offering defendant an opportunity to consult with counsel. And although the trial court failed to advise defendant of the charges and possible prison sentences as required by MCR 6.005(D)(1), the mere fact that a judge does not discuss the charges and possible penalties with a defendant is not enough to defeat a finding of substantial compliance with waiver procedures. *Adkins*, 452 Mich at 731. Here, the charges in the information were read to the jury in defendant's presence. Further, the record indicates that the prosecution filed notice before trial of its intent to seek sentence enhancement based on defendant's status as a fourth habitual offender, such that the maximum penalty for each charge would be life imprisonment. At trial, defendant informed the jury in his opening statement that his "life is on the line" and he was previously warned by the trial court that "[t]his isn't a parlor game. This is your life." Thus, the record establishes that defendant was aware of the seriousness of the charges.

In sum, the record discloses that the trial court substantially complied with the substantive requirements of *Anderson*, 398 Mich at 367-368, and MCR 6.005(D), and that defendant made a knowing, intelligent, and voluntary decision to represent himself at trial, despite the trial court's repeated warnings regarding the disadvantages of self-representation. According, defendant has not established any basis for relief with respect to this issue.

III. MOTION FOR MISTRIAL

Defendant argues that the trial court erred when it denied his motion for a mistrial after the prosecutor elicited testimony from Sergeant Christopher Cole that he started his investigation of this case after defendant's name was mentioned to him by a person in the insurance industry. Defendant argues that this testimony effectively informed the jury that he was a "bad man."

A mistrial should only be granted for an irregularity that prejudices a defendant's rights and impairs his ability to receive a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Although Sergeant Cole was qualified as an expert witness, the challenged testimony concerned his role as an investigating officer in the case. And while the prosecutor was unsuccessful in convincing the trial court to allow the challenged testimony, the record does not support defendant's argument that the prosecutor acted in bad faith. Defendant raised questions about the police investigation in his opening statement. He asserted that the "prosecution of this crime is malicious" and maintained that Sergeant Cole was negligent in the performance of his duties. It is apparent from the record that the prosecutor sought to question Sergeant Cole about how the investigation of defendant began in order to address the concerns previously raised by defendant. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Further, the challenged testimony was brief and not explored further. Indeed, the trial court sustained defendant's objection to the line of questioning, so Sergeant Cole did not disclose what information was provided to him by the insurance person regarding either this case or some other matter. The brief testimony was not so egregious that it prejudiced defendant's rights or impaired his ability to receive a fair trial. *Bauder*, 269 Mich App at 195. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. 180-DAY RULE

There is no merit to defendant's argument that the trial court lost jurisdiction to try him because of a violation of the statutory 180-day rule. The 180-day rule established by MCL 780.131(1) and MCL 780.133 governs the trial court's personal jurisdiction over a defendant. *People v Lown*, 488 Mich 242, 268-270; 794 NW2d 9 (2011). However, that rule only applies to inmates housed in a state correctional facility.[2] *Id.* at 255. Thus, it did not apply to defendant, who was incarcerated in the county jail while awaiting trial. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). Accordingly, there was no violation of the 180-day rule.

B. MOTION FOR ADJOURNMENT

Defendant contends that the trial court violated his right to retain counsel of his choice when it denied his motion to adjourn trial. We review a trial court's decision to grant or deny an adjournment for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). Relevant factors to consider include whether the defendant "(1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). To warrant reversal, a defendant must also show prejudice resulting from an abuse of discretion. *Coy*, 258 Mich App at 18-19.

Here, defendant requested an adjournment on the day scheduled for trial in connection with a claim that he had hired counsel. Although a defendant has a Sixth Amendment right to counsel of his choice, the right is not absolute. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). Defendant was clearly negligent in waiting until the day scheduled for trial to inform the trial court of his desire to proceed with newly retained counsel. Further, when an adjournment is requested to permit a defendant to retain new counsel, it is appropriate to consider whether a bona fide dispute existed with present counsel. *Id.* at 558 n 15; *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). Nothing in the record indicates that a bona fide dispute existed between defendant and his appointed counsel. Further, the trial court's ruling did not prevent defendant from proceeding with counsel of his choice. The court informed defendant that he was free to retain new counsel so long as counsel was present for trial. Under the circumstances, the trial court did not abuse its discretion by denying defendant's untimely request for an adjournment. Further, were we to find an abuse of discretion, the record reflects that, after the trial court's ruling, defendant's trial was adjourned for another week and the case was reassigned to a different trial judge. Considering that defendant's allegedly retained new counsel never appeared to request an adjournment, and the lack of any evidence that more time was needed to prepare for trial, defendant cannot establish that he was prejudiced by the trial court's decision.

C. TELEPHONIC TESTIMONY

Defendant claims that the district court violated his Sixth Amendment right of confrontation at the preliminary examination when the court allowed a witness, Gregory Martin,

[2] We reach this same conclusion with respect to MCR 6.004(D), which tracks the statutory rule. *Lown*, 488 Mich at 265-266 n 44.

to testify by telephone, and the circuit court later allowed Martin's preliminary examination testimony to be read to the jury at trial.

Initially, we disagree with the prosecution's argument that defendant waived any objection to Martin's telephonic testimony at the preliminary examination. MCR 6.006(B) provides that a district court, on motion, may allow telephonic testimony from a nonexpert witness upon a showing of good cause. Here, the record of the preliminary examination does not reveal any motion to allow Martin's telephonic testimony and we find no basis in the record to conclude that defendant waived any objection to the testimony. Cf. *People v Buie*, 285 Mich App 401, 417; 775 NW2d 817 (2009) (a defendant's failure to object to the taking of witness testimony by two-way, interactive video technology at trial did not constitute consent under MCR 6.006(C)).

A preliminary examination is not a constitutionally-based procedure. *People v Hall*, 435 Mich 599, 603, 613; 460 NW2d 520 (1990). The purpose of the preliminary examination is to establish whether there is probable cause for charging the defendant with the crime. See *People v Burrill*, 391 Mich 124, 130-131; 214 NW2d 823 (1974). Where an error is alleged to have occurred at the preliminary examination, the proper focus is its affect on the trial. *People v McGee*, 258 Mich App 683, 685; 672 NW2d 191 (2003). Because defendant raised a proper objection to the evidence at trial based on the Confrontation Clause, we shall consider his argument in that context.

Preserved evidentiary issues are generally reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216. But whether there was a violation of a defendant's Sixth Amendment right of confrontation is a question of constitutional law that we review de novo. *People v Bryant*, 483 Mich 132, 151; 768 NW2d 65 (2009), vacated sub nom *Michigan v Bryant*, ___ US __ ; 131 S Ct 1143; 179 L Ed 2d 1143 (2011).

The trial court admitted Martin's preliminary examination testimony at trial pursuant to the hearsay exception for former testimony of an unavailable witness, MRE 804(b)(1), despite defendant's constitutional challenge to the use of former telephonic testimony. Because defendant does not address the trial court's ruling under MRE 804(b)(1), we limit our review to defendant's constitutional claim and, more specifically, his argument that he was denied a face-to-face confrontation with Martin.

As explained in *People v Yost*, 278 Mich App 341, 369-370; 749 NW2d 753 (2008):

> A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 U.S. 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "'The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness.'" *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (opinion by Brickley, J.). The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, *supra* at 53-54.

While demeanor evidence is important, the substantive use of preliminary examination testimony at a trial does not violate the constitutional right of confrontation if the prosecutor exercised due diligence to produce the absent witness at trial and the testimony bears satisfactory indicia of reliability. *People v Bean*, 457 Mich 677, 682-683; 580 NW2d 390 (1998). The lack of a face-to-face encounter with a witness can affect reliability because testimony obtained thorough remote means does not provide the same truth-inducing effect as a face-to-face encounter. See *Buie*, 285 Mich App at 414. In addition, the Sixth Amendment right of confrontation generally requires a face-to-face confrontation. *Maryland v Craig*, 497 US 836; 849-850; 110 S Ct 3157; 111 L Ed 2d 666 (1990). "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850; see also *Buie*, 285 Mich App at 415, in which this Court remanded the case to the trial court to make case-specific findings regarding whether two-way video technology was necessary to further public policy or state interests enough to outweigh the defendant's right of confrontation.

Although this case involves the lack of a face-to-face encounter at a preliminary examination rather than at a trial, the same concerns may arise once it is determined that preliminary examination testimony obtained through remote means can be used as substantive evidence at trial. But it is unnecessary to decide whether the trial court applied proper constitutional standards here. Even if the trial court erred in admitting Martin's former telephonic testimony at trial, reversal is not warranted because, under the standards for preserved constitutional error, it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty even without Martin's testimony. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005).

Whether an error is harmless beyond a reasonable doubt depends on several factors, including the importance of the witness's testimony to the prosecution's case, whether the testimony is cumulative, the presence or absence of corroborating or contradictory testimony, and the overall strength of the prosecution's case. *People v Gursky*, 486 Mich 596, 620 n 46; 786 NW2d 579 (2010), citing *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Here, Martin's testimony presented a more complete picture of the transaction involving the purchase of the 2007 Lexus from defendant and Gadie, but it was not critical to the prosecution's case. The prosecutor presented documentary evidence and other witnesses, including Gadie, to establish that defendant, along with Gadie, used a false statement in the assignment of title for the 2007 Lexus to sell it to Motor Car Gallery in exchange for a cashier's check for $45,000. It is clear beyond a reasonable doubt that the jury's verdict would have been the same even without Martin's telephonic testimony at the preliminary examination. Therefore, any error in allowing Martin's preliminary examination testimony to be presented at trial does not require reversal.

Defendant also claims that he was deprived of his Sixth Amendment right of confrontation because the prosecutor failed to produce Kevin Brown and two other individuals at trial. Because defendant did not object on this ground at trial, this issue is not preserved. Therefore, review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. Here, there was no plain error because "the right to confrontation is not violated by the prosecution failing to call witnesses that defendant could have called to testify." *People v*

Cooper, 236 Mich App 643, 659; 601 NW2d 409 (1999). To the extent defendant challenges the trial court's discretionary decision to allow the prosecutor to strike the three witnesses for good cause, see MCL 767.40a(4); *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003), defendant has not established either an abuse of discretion or the prejudice necessary to succeed on such a claim. It is immaterial whether the individuals could be characterized as res gestae witnesses because the prosecutor has no duty to endorse or produce such witnesses. *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995).

Although defendant also asserts that the prosecutor's failure to produce the three witnesses violated his rights under the Equal Protection Clause, he fails to explain the basis for this argument. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim, or give a claim only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant is not entitled to relief.

D. JURY INSTRUCTIONS

Defendant avers that the trial court erred in granting the prosecutor's request for a special jury instruction with respect to the charge under MCL 257.254. We review the interpretation of a criminal statute de novo as a question of law. *People v Hill*, 486 Mich 658, 665-666; 786 NW2d 601 (2010). The primary goal of statutory interpretation is to ascertain the Legislature's intent. *Id.* at 667. Words used in a statute are to be given meaning by their context or setting. *Id.* at 668; *People v Adkins*, 272 Mich App 37, 39; 724 NW2d 710 (2006). We also review de novo questions of law involving jury instructions. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Jury instructions are examined as a whole to determine if there is error requiring reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006), aff'd in part 482 Mich 851 (2008); *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

MCL 257.254 prohibits different types of conduct. *People v Ross*, 204 Mich App 310, 311-312; 514 NW2d 253 (1994). For purposes of this case, the statute provides that "[a]ny person who shall knowingly make any false statement of a material fact, *either* in his or her application for the certificate of title required by this act, *or* in any assignment of that title, . . . is guilty of a felony" (emphasis added). Contrary to defendant's argument on appeal, this language does not require that a person both apply for the certificate of title and assign that title. The statute uses the term "either," which is defined in relevant part as "a coordinating conjunction that, when used with *or*, indicates a choice." *Random House Webster's College Dictionary* (1997), p 418 (emphasis in original). "The disjunctive term 'or' refers to a choice or alternative between two or more things." *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004). While "or" is sometimes misused in statutes, its literal meaning should be followed unless doing so renders the statute dubious. *People v Gatski*, 260 Mich App 360, 365; 677 NW2d 357 (2004).

Here, the use of the disjunctive "or" in combination with "either" in MCL 257.254 does not render the statute ambiguous. Therefore, we must apply the statute as written. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). Accordingly, the trial court did not err when it instructed the jury regarding the assignment of title element of the offense, without

including the "applied" language in CJI2d 24.7(2). A trial court is not required to use the standard jury instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

E. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecutor presented insufficient evidence to sustain his convictions. In considering a challenge to the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution to determine whether a trier of fact could find the essential elements of each crime proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006); *Gillis*, 474 Mich at 113. Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of a crime. *Unger*, 278 Mich App at 223.

The evidence showed that defendant obtained financing in excess of $50,000 to purchase the Lexus vehicle. Although the lienholder was listed on the certificate of title, defendant obtained a corrected certificate of title approximately a week later that did not list the lien. Defendant then sold the Lexus ten days after he purchased it and assigned the title without disclosing the lien. Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish that defendant had knowledge of a false statement of material fact when he assigned the title for the 2007 Lexus without disclosing the lien. Thus, the evidence was sufficient to support defendant's conviction under MCL 257.254.

The evidence was also sufficient to support defendant's conviction for larceny by conversion over $20,000. To establish this offense, there must be proof that the defendant obtained possession of another person's property with lawful intent, and subsequently converted the property to his or her own use. *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001); see also *People v Christenson*, 412 Mich 81, 86; 312 NW2d 618 (1981). The defendant must have a fraudulent intent at the time of the conversion. *Mason*, 247 Mich App at 73. There must be an intent to permanently deprive the owner of the property. *Id.* at 72. Ownership of the property is critical to the charge because a person cannot convert his or her own property. *Id.* at 73. "Thus, if an owner intends to part with title as well as possession, there can be no crime of larceny." *Christenson*, 412 Mich at 87.[3] A mere transfer of possession of property to a defendant does not establish a transfer of ownership because the transferor may intend to retain legal title. *Mason*, 247 Mich App at 74-75. An owner of money may retain legal title to the money by entrusting a defendant with the money, with the expectation that the same amount will be returned if the transaction underlying the entrustment fails. *Id.* at 77.

Here, the prosecutor's theory at trial was that defendant converted the loan money provided by TMC for the 2007 Lexus to his own use by selling the vehicle without disclosing the lien and then receiving the money, instead of having the money returned to TMC. We reject defendant's argument that his status as an "owner" of the Lexus under the definition of "owner"

[3] "If the owner is induced to part with both possession and right of ownership by fraudulent representations of one who receives the property with felonious intent, the proper charge is false pretenses." *Christenson*, 412 Mich at 87 n 4.

in the Motor Vehicle Code, MCL 267.37, precluded the prosecutor from pursuing this theory as a matter of law. The more pertinent provision of the Motor Vehicle Code is MCL 257.338(8), which requires disclosure of a security interest when making an assignment. Thus, TMC would have reasonably expected to have its security interest disclosed to a subsequent purchaser of the vehicle. The Motor Vehicle Code incorporates the definition of "security interest" in the Uniform Commercial Code (UCC), see MCL 257.58b, which defines "[s]ecurity interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation." MCL 440.1201(27). Under Article 9 of the UCC, which governs secured transactions, a security interest is created by agreement. MCL 440.9102(1)(ttt); *Roan v Murray*, 219 Mich App 562, 565; 556 NW2d 893 (1996).

Viewed in a light most favorable to the prosecution, there was overwhelming evidence that TMC made a loan to defendant and Gadie to enable them to purchase the 2007 Lexus and that they were issued a title disclosing TMC's lien on the vehicle. In addition, several witnesses, including Dennis Koss, a Secretary of State investigator, explained how money is returned to lenders when a vehicle subject to a disclosed security interest is sold. Stephen Crecelius, the operations manager for Toyota Financial Services, testified that TMC would have expected the return of the money upon sale of the vehicle. The evidence was sufficient to enable the jury to infer that TMC intended to retain title to the loan money unless it was actually used for the 2007 Lexus. Although defendant and Gadie obtained at least constructive possession of the loan proceeds for this specific purpose when they purchased the Lexus vehicle on March 31, 2007, the loan money was fraudulently converted to defendant's own use when he, along with Gadie, made a false assignment of the title to Motor Car Gallery ten days later in exchange for a cashier's check for $45,000. Defendant's subsequent action in cashing the cashier's check, without returning the proceeds to TMC, supports an inference that he intended to permanently deprive TMC of the money, regardless of whether TMC had a right to assert its security interest in the Lexus or could have exercised other contract rights to collect the outstanding debt. Accordingly, the evidence was sufficient to sustain defendant's larceny conviction.

F. COMPLAINT AND ARREST

Relying on *In re Morton*, 10 Mich 208 (1862), defendant argues that the district court never lawfully acquired jurisdiction in this case because probable cause for the complaint and his arrest were not established. Because defendant did not challenge the validity of the complaint or his arrest in the trial court, these issues are not preserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant's reliance on *In re Morton* is misplaced because this case does not involve contempt proceedings relative to an individual's refusal to answer questions concerning a complaint. The circuit court acquired jurisdiction when the district court filed a return with the court after the preliminary examination. *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). Thus, there was no jurisdictional defect.

The primary purpose of the earlier complaint in this case was to move the magistrate to determine whether there was probable cause to issue an arrest warrant. *People v Higuera*, 244 Mich App 429, 443; 625 NW2d 444 (2001); see also MCL 764.1a. A signed complaint and warrant form the basis for initiating a criminal prosecution based on an information. *People v*

Glass (After Remand), 464 Mich 266, 277; 627 NW2d 261 (2001). But a defendant is entitled to a preliminary examination before an information is filed at which the magistrate determines whether there was probable cause for charging the defendant with the crime. See *Burrill*, 391 Mich at 130-131. The sole remedy for an illegal arrest is the suppression of evidence obtained as a result of that arrest. *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991). Because defendant does not identify any evidence that he believes was obtained as a result of his arrest, it is unnecessary to further address the validity of the arrest. Defendant has not established any substantial right that was affected by his contested arrest. *Carines*, 460 Mich at 763.

To the extent defendant argues that he was not given adequate notice of the charges, the record does not support defendant's claim. On the contrary, the record shows that defendant was tried for the very charges stated in the original and amended information, which added Gadie as a witness. There is no basis to conclude there was a violation of defendant's due process right to reasonable notice of the charges against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

G. ARRAIGNMENT ON COMPLAINT

Defendant claims that he was deprived of his right to counsel at the initial arraignment on the complaint on January 6, 2008. Again, this issue is unpreserved and our review is limited to plain error. *Carines*, 460 Mich at 763. We find no merit to defendant's argument because an arraignment is not considered a critical stage of a criminal proceeding, given that it does not involve activity where a defendant's rights may be sacrificed or defenses lost. *People v Green*, 260 Mich App 392, 399-400; 677 NW2d 363 (2004), overruled on other grounds in *People v Anstey*, 476 Mich 436, 447 n 9; 719 NW2d 579 (2006). Stated otherwise, the arraignment on a warrant does not affect the defendant's right to a fair trial. *Id.* at 400. Defendant has not established anything about the arraignment in this case that compels a different result.

H. PROSECUTORIAL MISCONDUCT

Defendant contends that reversal is required because of prosecutorial misconduct. Defendant has not supported his argument with citations to the record. A "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Contrary to what defendant suggests, he was not prosecuted simply for defaulting on a loan obligation. Further, to the extent defendant argues that he was not provided with sufficient notice of the charges, we reject this argument for the reasons indicated in part IV(F) of this opinion. And to the extent defendant challenges the trial court's decision to allow the prosecutor to strike Brown and two other witnesses from her witness list, our discussion in Part IV(C) of this opinion is dispositive of this cursory claim.

Finally, to the extent defendant argues that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by not disclosing impeachment and exculpatory evidence relating to Brown and Gadie, his argument fails because he has not demonstrated that any evidence actually existed that was known to the prosecution and not disclosed. The burden rested with defendant to prove a *Brady* violation. *People v Lester*, 232

Mich App 262, 281-282; 591 NW2d 267 (1998). Accordingly, defendant is not entitled to relief on this issue.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that a new trial is required because he did not receive the effective assistance of counsel. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for a *Ginther*[4] hearing, our review is limited to errors apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A defendant claiming ineffective assistance of counsel bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

To the extent defendant argues that counsel's performance at trial was deficient, his waiver of his right to counsel at trial precludes any relief. *Kevorkian*, 248 Mich App at 427. Although defendant's waiver of his right to counsel at trial does not preclude him from challenging counsel's pretrial performance, defendant has the burden to establish the factual predicate for his claim that he was denied the effective assistance of counsel. *Carbin*, 463 Mich App at 600. Here, defendant relies mostly on the other issues raised in his Standard 4 brief to establish the factual bases for his claims. Our rejection of defendant's other claims of error also precludes relief under an ineffective assistance of counsel theory. To the extent defendant makes other general claims regarding counsel's alleged deficiencies, his arguments lack factual support. Defendant has failed to show that he was deprived of the effective assistance of counsel.

J. SENTENCING GUIDELINES

Defendant lastly argues that the trial court erred in scoring offense variables 14 and 16 of the sentencing guidelines. When scoring the sentencing guidelines, a trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*. We review any findings of fact made by the trial court at sentencing for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A sentencing court may consider all record evidence, including evidence admitted at trial, when scoring the guidelines. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

The trial court scored ten points for OV 14 because it concluded that defendant was a leader in a multiple offender situation. MCL 777.44(1)(a). We disagree with defendant's assertion that the evidence did not establish that he was a leader. "The entire criminal episode should be considered when scoring this variable." MCL 777.44(2)(a). At trial, Gadie testified that she acted at defendant's direction. Gadie also testified that defendant received all of the proceeds from the sale of the 2007 Lexus vehicle. Gadie's trial testimony supports the trial

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

court's determination that defendant was a leader. The trial court did not abuse its discretion in scoring ten points for OV 14.

There is also no merit to defendant's argument that the trial court erred in scoring ten points for OV 16. Ten points are to be scored for OV 16 if the value of property obtained, damaged, lost, or destroyed was more than $20,000. MCL 777.46(1)(b). The trial evidence supports the trial court's ten-point score for OV 16 because it showed that defendant obtained a loan for more than $50,000 to finance his purchase of the Lexus and then sold the Lexus ten days later for $45,000 without disclosing the lien or repaying the loan.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad